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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 650

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

vs.

VIRDIE SCHIEL, FRANK SCHIEL, SR.,
MARY LOU SCHIEL and LORRAINE SCHIEL
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York Life Insurance Company, a corporation, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause reversing the judgment of the United States District Court for the District of Arizona.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 116) is not yet reported. The concurring opinion is at R. 129. Petitioner on January 20, 1950 filed with the Circuit Court of Appeals its petition for rehearing. The petition was denied on January 23, 1950 (R. 133).

Statement of Matter Involved

This action was instituted by petitioner in the District Court of the United States for the District of Arizona for the purpose of securing reformation of a policy of life insurance which had been issued by it. (R. 2) The respondents, beneficiaries under the policy, counterclaimed for the face amount of the policy. (R. 39) The District Court granted reformation, (R. 56) and thereafter entered a summary judgment for petitioners on respondents' counterclaim. (R. 74) Respondents appealed to the Court of Appeals for the Ninth Circuit. (R. 78) The Court of Appeals reversed the judgment upon the ground that petitioner was not entitled to reformation. (R. 132)

The pertinent facts with respect to the issue of reformation are as follows:

The insured made application to petitioner for a policy of life insurance on August 10, 1935. In his application the insured answered in the negative the question: "Do you contemplate participation in aeronautics?" (R. 19) The policy was issued, and contained among others, the following provisions:

> "This policy is free of conditions as to residence, travel, occupation, and military or naval service, except as to provisions and conditions relating to Double Indemnity and Disability Benefits." (R. 15).
>
> "This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity and Disability Benefits." (R. 15)
>
> "This Policy may be reinstated at any time within five years after any default, upon presentation

> at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at six per cent per annum thereon from their respective due dates. * * *" (R. 11)

The policy lapsed for non-payment of premium on August 10, 1936. (R. 46) Under date of January 24, 1939, insured made application for reinstatement. (R. 20). The questions contained in the application for reinstatement were substantially the same as those contained in the original application. In answer to the question "do you contemplate participation in aeronautics? (If so, in what capacity?)" the insured stated: "Yes, as pilot." (R. 20) Upon receipt of the application by petitioner, insured was requested to fill out and return a questionnaire relative to aeronautical activites. (R. 21) Insured stated therein: "I am a candidate for Randolph Field as student pilot — expect to be called in a month." (R. 21) He also stated that his use of aircraft would be in "Military operation."

Upon receipt of the questionnaire, petitioner advised insured that it would not reinstate the policy in the original form, and offered to issue a policy similar to that which had lapsed but without double indemnity benefits and with an aviation clause included which would limit the benefit payable in the event of death resulting from aeronautical activity. (R. 47) Petitioner and his mother, one of the beneficiaries, then signed and delivered to petitioner a request (form 2274) to change the policy: "Same plan, with waiver of premium, but without double indemnity benefit, and with aviation "A" clause in loco." (R. 22) and also a letter reading as follows: (R 27)

"Date.....

New York Life Insurance Company
51 Madison Avenue
New York, New York
Gentlemen:

In connection with my application for reinstatement and the offer you made, I request you to endorse on policy No. 12666 606 the following clause:

"Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) The Company will pay to the beneficiary in lieu of the amounts provided in this policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy."

(sgd) Insured, Frank Schiel, Jr.

Mother
Beneficiary, Virdie E. Schiel

Witness florence klein-tracy

.....

.....

....."

The policy was returned to petitioner for endorsement in connection with the application for reinstatement and the requests for change in the form of the policy. An endorsement was placed thereon excluding double indemnity benefits; photostatic copies of the application for reinstatement and the request for change (form 2274) were attached to the policy and it was returned to insured. (R. 9) By reason of mistake, inadvertence and oversight of petitioner's clerical employees the permanent aviation clause was not endorsed on the policy. (R. 48)

While the policy was in force, the insured was killed on December 5, 1942 in the crash of the P-38 airplane which he was piloting on a military mission to China. (R. 103) Thereafter, and on July 27, 1943, petitioner instituted this action against the respondents, as beneficiaries of said policy, to secure reformation of said policy by the inclusion of the permanent aviation clause. (R. 2) Respondents counterclaimed for the face of the policy. (R. 39) Based upon a stipulation of facts the District Court entered judgment of reformation as prayed for on September 12, 1945. (R. 56) Thereafter and on the 9th day of March, 1949, the court entered a summary judgment, upon motion of petitioner, that respondents were entitled under their counterclaim to the reserves on the policy in the amount of $448.80, rather than the face amount of $5,000. (R. 74) The summary judgment was based upon depositions disclosing the manner of insured's death.

Respondents appealed to the Court of Appeals for the Ninth Circuit. (R. 78) That Court rendered its opinion on the 21st day of December, 1949 reversing the judgment of the District Court upon the ground that

petitioner was not entitled to reformation. (R. 116) The majority opinion based the decision upon the conclusion that petitioner did not have the right to demand the inclusion of the permanent aviation clause as a condition to reinstatement. The concurring opinion pointed out that the decision should be predicated upon the rule announced in *Richardson* v. *Travelers Insurance Co.* (9-Cir.) 171 F. 2d 699, namely that reformation is precluded by the incontestable clause. (R. 129)

Jurisdiction

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under and pursuant to the provisions of Title 28, United States Code, Section 1254; 62 Stat. 928.

Questions Presented

The questions presented by this petition are as follows:

1. Under the provisions of a reinstatement clause of a life insurance policy reading:

> "This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at six per cent per annum thereon from their respective due dates.",

does the insurer have the right to condition reinstatement upon the insertion of a clause in the policy which will limit the benefits payable in the event of death resulting from participation in aeronautics, where

(a) upon inquiry in connection with the issuance

of the policy insured stated that he did not intend to participate in aeronautics, and

(b) upon inquiry in connection with the reinstatement insured stated that he intended to engage in military aviation, and

(c) the policy contains an occupation clause reading:

"This policy is free of conditions as to residence, travel, occupation and military or naval service, except as to provisions and conditions relating to double indemnity and disability benefits."

2. In the face of an incontestable clause reading:

"This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity and Disability Benefits.",

does the insurer, more than two years after issuance and last reinstatement, have the right to reformation of a life insurance policy by reason of mutual mistake?

Reasons for the Allowance of the Writ

1. The Circuit Court of Appeals has decided an important question of Arizona law in a way in conflict with applicable Arizona decisions.

2. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same question.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued in the above named cause under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court

a full and complete transcript of the record and proceedings had in this cause to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein of the United States Circuit Court of Appeals for the Ninth Circuit be reversed with instructions to affirm the judgment entered herein by the District Court of the United States for the District of Arizona.

Dated, this 28th day of February, 1950.

DENISON KITCHEL
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Phoenix, Arizona

Attorney for New York Life
Insurance Company, *Petitioner*

Ferdinand H. Pease
Joseph S. Jenckes, Jr.

Of Counsel

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introduction

The opinion of the lower Court has not yet been officially reported. The majority opinion is found at page 116 of the Record and the concurring opinion is found at page 129 of the Record. A statement of the matter involved and the basis for invoking the jurisdiction of this Court is set forth in the foregoing petition. The following argument follows in numerical sequence the questions presented in the petition.

ARGUMENT

I

DID PETITIONER HAVE THE RIGHT TO CONDITION REINSTATEMENT UPON INCLUSION OF THE PERMANENT AVIATION CLAUSE?

A. Conflict with Local Decisions

It must be conceded that the Court of Appeals had the duty to determine this case in accordance with the law of the State of Arizona. *Erie Railroad Co.* v. *Tompkins* 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487; *Wilmington Trust Co.* v. *Mutual Life Insurance Co.* (CCA 3) 177 F.2d 404. We submit that the decision of the Court of Appeals is contrary to the rule established by the Supreme Court of Arizona in the case of *Equitable Life Assur. Soc.* v. *Pettid,* 40 Ariz. 239, 11 P.2d 833. In that case a judgment for the beneficiary and against the insurance company for the proceeds of a life insurance policy was reversed by the Arizona Court. The case turned upon the question of whether or not reinstatement of the policy had been effected after lapse. The insured had not furnished "evidence of insurability" as required by the reinstatement clause. The court stated:

> "It is urged by plaintiff, and apparently the trial court gave some weight to her contention, that, since there was evidence in the record showing that the insured was in good health at the time of his death, the furnishing of the certificate of health was immaterial. The answer is that the condition of the policy in regard to reinstatement was not merely that insured should be in good health, but that, as a condition precedent to reinstatement, he should furnish evidence, not merely of good health,

but of insurability to the satisfaction of defendant, a matter involving other elements than personal good health." (11 P.2d 839)

The breadth of the Arizona decision is illustrated by the opinions of the courts of Utah and Missouri in the cases of *Gressler* v. *New York Life Ins. Co.* 108 Utah 173, 156 P.2d 212; and *Kirby* v. *Prudential Insurance Co.* (Mo.) 191 S. W. 2d 379, 162 ALR 660. In the *Gressler* case the Supreme Court of Utah stated:

> "The first condition imposed by the reinstatement clause here was that the insured present at the home office evidence of insurability *satisfactory to the company*. 'Insurability' as here used may include, in addition to the state of the insured's health, matters affecting the insurance risk involved such as would have been taken into account at the time the policy of insurance was originally issued. See Equitable Life Assurance Society, v. Pettid, 40 Ariz. 239, 11 P. 2d 833; Kallman v. Equitable Life Assurance Society, 248 App. Div. 146, 288 N.Y.S. 1032, affirmed 272 N.Y. 648, 5 N.E. 2d 375." (P. 214)

The *Kirby* case is almost on all fours with the case at bar. In that case the insurance policy lapsed and insured applied for reinstatement. As in the case at bar, the insured had stated in his original application that he did not intend to engage in "aerial flights," and in his application for reinstatement it appeared that he did intend to so engage. As here, the insurer proposed, as a condition to reinstatement, that an aviation clause be inserted in the policy limiting liability in the event of death as a result of riding in aircraft. Insured rejected the proposal and was later killed. In an action by the beneficiary the question arose as to whether or

not the insurer had the right to condition reinstatement upon inclusion of the aviation clause. The Missouri court held that it did. In reaching its decision the court relied upon *Equitable Life Assurance Soc.* v. *Pettid, supra.* The Court stated:

> "It is proper for an insurance company, when considering an application for reinstatement, to inquire into the same matters that it took into consideration when the policy was originally issued and if such inquiry develops facts establishing a change in the status of insured having the effect of 'substantially increasing the chances of the happening of the event insured against' it may legitimately refuse to reinstate the policy." (162 ALR 667)

The Court of Appeals attempts to circumvent the Arizona rule by a distortion of the so-called occupation clause reading:

> "This policy is free of conditions as to residence, travel, occupation, and military or naval service, except as to provisions and conditions relating to Double Indemnity and Disability Benefits." (R. 15)

The Court, in effect, holds that in determining whether or not "evidence of insurability" is satisfactory to the company, upon application for reinstatement, it is precluded by the occupation clause from considering any circumstances relative to insured's residence, travel, occupation or military service because "insured's liberty of action in all those matters was a measure of insurability fixed and determined by the original contract." (R. 126) An analysis of the occupation clause will disclose that it does not and cannot, in any respect, qualify or limit the term "insurability" found in the reinstatement clause.

"Insurability" means "capable of being insured." Whether or not a person is capable of being insured depends upon a consideration of all factors material to the risk. The number of such factors is in direct proportion to the scope of the coverage, i.e. risk to be assumed. In other words, if the coverage is limited such factors will be few. As coverage increases so do the factors material to the risk. If, for example, a policy of insurance covers only injuries sustained while riding upon a railroad train, the only factor material to the risk would be the insured's likelihood of using such means of conveyance and the frequency thereof. On the other hand, if a policy of insurance covers death from any cause, then any facts or circumstance which would increase or decrease such hazard would be material to the risk assumed. Therefore, although the reinstatement clause is self-contained, we are permitted to look at the insuring clauses of the policy to determine the scope of the risk which the company is asked to reassume.

The occupation clause does not extend or restrict the coverage of the policy or the liability of petitioner thereunder. It is purely a statement of fact that the policy is unlimited as to coverage and that insured may engage in any occupation, reside or travel anywhere or join the army or navy without affecting the liability of petitioner to pay the face amount of the policy upon death. The liability of the petitioner would have been exactly the same whether such clause were included or excluded. As the inclusion or exclusion of the clause from the policy does not change the scope of coverage, it is clear that its inclusion or exclusion cannot change the meaning of "insurability."

The following example will show why the occupation clause cannot be deemed to modify the term "insurability" in the reinstatement clause. Let us assume that the occupation clause is amplified to read:

> "This policy is free of conditions as to residence, travel, occupation, contraction of or exposure to disease, consumption of spirits, financial or domestic difficulties, social habits and military and naval service."

The contractual force of our amplified clause is no greater nor less than as originally written. It merely gives greater emphasis to the unlimited coverage of the policy. It makes clear to the insured that no matter how circumstances may change, his insurance protection shall in nowise be limited. Let us further assume that the policy lapses and on application for reinstatement the company ascertains that the applicant, originally an accountant in good health, is now suffering from cancer, is drinking to excess and has changed his occupation to that of a movie stunt man. The company refuses reinstatement, but offers to issue a policy similar to that which has lapsed but modified to the extent that in the event of death resulting directly or indirectly from cancer, stunting accidents or drinking, only a restricted amount will be payable. The applicant then takes the position that this is an offer of reinstatement and that under guise of reinstatement the company is undertaking to rewrite the contract in such fashion as to repudiate risks assumed at the outset. He points out that if the company can do this it can with equal facility exclude altogether any and all other risks referred to in the "occupation clause," whereas his liberty of action in all such matters was a measure of his insurability fixed and determined by the terms of the

original contract. The patent absurdity of such contention makes it startlingly clear that "insured's liberty of action" in all those matters (his right to contract or expose himself to any disease, to drink intoxicating liquors, to engage in any hazardous occupation whatsoever, etc.) is not a measure of insurability—it is a measure of the company's liability—a liability which terminates upon lapse. We have seen that if such liberty of action has any bearing whatsoever upon insurability it is to increase rather than limit the factors material to the risk upon a consideration of which insurability is determined. A contrary construction of our hypothetical "occupation clause" would mean that because the company had assumed an unlimited risk at the outset it must, after lapse and upon payment of delinquent premiums, reassume that risk no matter to what extent the hazard of death had increased. If such construction were correct, there would be no purpose in the Company including the condition regarding the requirement of evidence of insurability in order to effect a reinstatement.

In its opinion the Court of Appeals states:

> "The company made no claim that Schiel had become uninsurable for ordinary life purposes in the amount originally written; in fact it conceded by its conduct that he was insurable for those purposes and in that amount. It declined, however, to reinstate the ordinary life policy except upon a condition importing a concept of insurability at variance with the policy as written. This, we think it might not do." (R. 124)

We believe that the above quoted statement was prompted by the decision of the Supreme Court of Illinois in *Kahn* v. *Continental Casualty Company,* 391

Ill. 445, 63 N.E. 2d 468. In that case the insurance company refused to reinstate except upon condition that the benefits of the policy be reduced or that insured make like reductions in similar policies which insured had subsequently taken out. The court pointed out that the company at all times had treated the insured as insurable and that the company conceded insurability by offering to reinstate the policy *in its original form* on condition that insured would reduce or cancel his other insurance.

In the case at bar petitioner did not concede insurability. At no time did it offer to reinstate the policy *in its original form*. The condition which it imposed was the exclusion of insurance coverage during participation of insured in aviation. The effect of petitioner's offer was a rejection of the application to reinstate the policy in its original form and an offer to issue what would amount to a different contract.

Insured's participation in aviation was a factor which petitioner considered at the time the policy was issued. It appeared from the original application that insured did not intend to engage in such activity. It is true that after the policy was issued (and prior to lapse) insured was free to engage in any activity whatsoever without jeopardizing his insurance, but after lapse insurer had no obligation to reinstate upon a consideration of insurability any different from that which it had originally applied. If the original application had disclosed insured's intention to engage in aviation and the application for reinstatement likewise showed such intent and if petitioner had refused to reinstate except upon inclusion of the aviation clause, then the

following language of the Court of Appeals would have been applicable:

> "It (petitioner) declined, however, to reinstate the ordinary life policy except upon a condition importing a concept of insurability at variance with the policy as written"—

at variance with the concept of insurability adopted by petitioner in writing the policy. The same can be said if the original application showed that insured was suffering from tuberculosis and the application for reinstatement showed the same condition. An offer to reinstate upon condition that death from tuberculosis be eliminated as a risk, would import a concept of insurability at variance with the underwriting practice of the company. No one would suggest, however, that such condition would import a concept of insurability at variance with the policy as written if the tubercular condition was not shown to exist at the time of the original application.

We submit that the concept of insurability as disclosed by the policy and insurer's practice in passing upon risks includes the principle that active participation in aviation precludes insurability under an unlimited contract.

There is a line of authority which supports the decision of the Court of Appeals and which stems from the "leading case" of *Sussex* v. *Aetna Life Assurance Company,* 33 Dominion Law Reports 549, 38 Ontario Law Reports 365. These decisions announce the "minority" rule that the term "insurability" as used in the reinstatement provisions of life, health or accident policies is not more comprehensive than the term "good health."

Chambers v. *Metropolitan* L. Ins. Co. (1940) 235 Mo. App. 884, 138 S.W. 2d 29;

Smith v. *Bankers Nat. L. Ins. Co.* (1936) 130 Neb. 552, 265 N.W. 546;

Missouri State L. Ins. Co, v. *Hearne* (1920 Tex. Civ. App.) 226 S. W. 789;

Illinois Bankers Life Assur. Co. v. *Payne* (1936; Tex. Civ. App.) 93 S.W. 2d 576;

Annotation 162 ALR 675.

If the *Sussex* rule is applied here the decision of the Court of Appeals is correct. As insured was in good health at the time of application for reinstatement, petitioner (under such rule) had no alternative but to reinstate the policy in its original form. The *Sussex* rule, however, is opposed to the "majority" rule which was promulgated by the Supreme Court of Arizona in *Equitable Life Assurance Soc.* v. *Pettid, supra,* and which is followed in:

Greenberg v. *Continental Casualty Co.* (1938) 24 Cal. App. 2d 506, 75 P.2d 644;

Kahn v. *Continental Casualty Co.* (1945) 325 Ill. App. 1, 59 N.E. 2d 524 (reversed on other grounds in (1945) 391 Ill. 445, 63 N.E. 2d 468);

Kirby v. *Prudential Ins. Co.* (Mo. App.) 191 S. W. 2d 379, 162 ALR 660;

Ginsberg v. *Eastern L. Ins. Co.* (1935) 118 N.J. Eq. 223, 178 A. 378 (affirmed in (1936) 120 N.J. Eq. 110, 184 A. 348);

Kallman v. *Equitable Life Assur. Soc.* (1936) 248 App. Div. 146, 288 N.Y.S. 1032 (affirmed in (1937) 272 N.Y. 648, 5 N.E. 2d 375);

Gressler v. *New York L. Ins. Co.* (1945) 108 Utah 173, 156 P.2d 212 (modified on rehearing in other respects in (1945) 108 Utah 182, 163 P.2d 324);

Annotation 162 ALR 670.

Under the Arizona rule, the term "insurability" is deemed to be broader than good health. As pointed out in the Annotation in 162 ALR 677, the *Pettid* case supports the conclusion that the term "insurability" as applied in the policy provision dealing with reinstatement embraces all matters which the insurer took into consideration when issuing the original policy, and only those. Thus, while "insurability" is construed as having a broader meaning than "good health", it does not permit the insurer to take into consideration, for the purpose of reinstating the policy, facts into which it did not inquire at the time the original policy was issued.

We submit that the decision of the Court of Appeals with respect to an important question of local law—expressly bottomed upon the *Sussex* rule that good health is the only consideration on reinstatement—is clearly and directly in conflict with the Arizona rule to the contrary. We also submit that the decision of the Court of Appeals is interdicted by the unequivocal language of the Supreme Court of Arizona in the *Pettid* case:

> "The court cannot write a new contract for the parties in accordance with its idea of what the original one should have been. * * * But, where the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the con-

tract which the parties have not put there." (11 P.2d 833, 837)

It must also be borne in mind that the learned district Judge who decided this case has, through long experience as a lawyer, Superior Court Judge and District Judge, an intimate knowledge and understanding of the laws of the State of Arizona. Of necessity, it was his opinion that were this case to be decided by the Supreme Court of the State of Arizona, the *Pettid* rule would be applied. His judgment as to the applicable Arizona law is entitled to as much, if not greater consideration, than the Court of Appeals. This is all the more true where, as here, the Court of Appeals made no apparent attempt to place itself in the shoes of the Supreme Court of the State of Arizona.

It should be unnecessary to advert to the importance of the rule of local law here being considered. This Court will judicially notice that hundreds of thousands of life insurance policies are written in this country containing — by command of statute[1] — reinstatement clauses similar to that under scrutiny here. The proper interpretation of that clause is of very real concern to the holders of such policies and to the many insurance companies issuing them. A review of the judgment of the Court of Appeals is urgently required by the importance of the rule here involved to every person in the State of Arizona holding a life insurance policy and to every life insurance company issuing insurance in that state.

B. Conflict Between Circuits

We believe that the interpretation placed upon the reinstatement clause by the Court of Appeals for the

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1 Sec. 61-705 (9) Arizona Code Annotated, 1939.

Ninth Circuit is in conflict with the rule announced by the Court of Appeals for the Fifth Circuit in *Lanier* v. *New York Life Ins. Co.* (CCA 5) 88 F. 2d 196. In considering a reinstatement clause identical to that involved here, the Fifth Circuit held:

> "It has been said that reinstatement when the conditions are met is a positive right and may be specifically enforced. Mutual Life Ins. Co. v. Lovejoy, 203 Ala. 452, 83 So. 591. See, also, Leonard v. Prudential Ins. Co. 128 Wis. 348, 107 N.W. 646, 116 Am. St. Rep. 50. But the stipulation that the company shall have evidence of insurability satisfactory to it is a real and a reasonable qualification. The company need not reassume its obligations if it honestly thinks the risk is no longer a proper one. It probably could not refuse for some collateral reason, as that it wished to reduce its outstanding insurance or to withdraw from the state, nor capriciously and without any reason. But one who contracts that he shall be satisfied touching a matter of opinion or judgment is entitled to satisfaction. Sheperd v. Union Central Life Ins. Co. (C.C.A.) 74 F.(2d) 180, and authorities cited." (P. 198)

In the case at bar the Ninth Circuit has denied to petitioner the right to be satisfied that the risk originally assumed by it was—at the time of the application for reinstatement—a proper one.

II

DOES THE INCONTESTABLE CLAUSE PRECLUDE REFORMATION?

A. Conflict Between Circuits

This action was instituted by petitioner for the purpose of reforming the policy to include the so-called

aviation clause, and was commenced well over two years after issue and reinstatement. Respondents contend that the action for reformation is a contest precluded by the incontestable clause reading:

> "This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity and Disability Benefits." (R. 15)

The decision of the Court of Appeals for the Tenth Circuit in the case of *Columbian National Life Insurance Company* v. *Black,* (CCA 10) 35 F. 2d 571, 71 ALR 128 is direct and specific authority for the granting of reformation in this case. The Court stated:

> "* * * we hold that an action to correct a purely clerical error in a policy issued, so that it will speak the truth as to the agreement of the parties, is not barred by the incontestable clause." (P. 139)

In the case of *Richardson* v. *Travelers Ins. Co.* (CCA 9) 171 F.2d 699 the Court of Appeals for the Ninth Circuit considered and flatly rejected the Tenth Circuit decision and held that an action for reformation constitutes a contest prohibited by the incontestable clause. There is no basis for reconciling the conflicting decisions of the Ninth and Tenth Circuits. In his concurring opinion herein, (R. 129) Judge Bone bases his concurrence upon the *Richardson* case. Aside from any other questions raised herein, it must be conceded that the judgment of the District Court cannot stand in the face of the rule announced in the *Richardson* case. Presumably, if the judgment of the Court of Appeals is correct for any reason it will be sustained.

Frey & Son v. *Cudahy Packing Co.* 256 U. S. 208, 41 S.Ct. 451, 65 L.Ed. 892.

We respectfully submit that Certiorari should be granted herein if for no reason other than to eliminate the uncertainty created by the conflicting Ninth and Tenth circuit decisions. Incontestable clauses in life insurance policies are demanded by statute. (Sec. 61-705(3) Arizona Code Ann. 1939) Practically every policy holder and every life insurance company in the United States are concerned with the proper interpretation of the incontestable clause. Where a resolution of conflicting decisions is of such vital consequence to so large a segment of the American public, we feel that this Court will be more than justified in accepting the burden of eliminating uncertainty.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, February 28, 1950.

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